In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1001

ALEXANDER F. MAJEWSKI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his conviction should be reversed because an oral statement he made was not preceded by *Miranda* warnings and because items were taken from his automobile without his consent.

On November 9, 1970, a federal Grand Jury sitting in New Haven, Connecticut returned an eleven-count indictment charging petitioner with having caused forged securities to be transported in interstate commerce in violation of 18 U.S.C. 2314. In January 1972, the district court denied petitioner's motion for the suppression of evidence (Pet. App. A), and following a jury trial in February 1972, he was convicted on all counts and sentenced to concurrent terms of one year's imprisonment on each count. The court of appeals affirmed without opinion (Pet. App. C).

At various times during the year 1965, petitioner opened savings accounts at several banks in the area of greater Bridgeport, Connecticut in a variety of fictitious surnames (App. 699).[1] He made small cash deposits in each account. On November 23 and 24, several forged checks were deposited in these accounts. The checks were drawn on Brooklyn, New York, banks on accounts in the names of Steven Weinberg and Barry Eckstein (App. 303-308; 341-344). The checks were subsequently returned unpaid by the drawee banks (App. 413-414; 434).

The savings accounts then remained dormant until September 16, 1968 when petitioner appeared at the Mechanics & Farmers Savings Bank in Bridgeport and attempted to withdraw the balance of $16.87 from an account in the name of "Albert East". The account had been "flagged" as a result of the prior forged check activity and the bank manager summoned police to the bank when the withdrawal request was presented.

Sgt. Alexander Wlcek of the Bridgeport Police Department testified at a suppression hearing held prior to trial that he had been summoned to the Mechanics and Farmers Bank on September 16, 1968 by the bank's manager (App. 62-63). Wlcek advised petitioner of his rights and asked him to go down to headquarters to discuss the matter further (App. 63-64). While still at the bank, Wlcek asked petitioner if he could look into petitioner's car. Petitioner agreed and the two men walked to the car. Petitioner then reached under the front seat and produced a number of bank books, which he gave to Wlcek (App. 64-65). He also gave Wlcek two bank books from his

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[1] "App." refers to the appendix filed in the court of appeals which we are lodging with this Court.

pockets. Petitioner and Wlcek then proceeded to police headquarters where petitioner, who was again advised of his rights, executed a consent to search his car and his home (App. 66-67). After petitioner's home was searched, Wlcek and petitioner again returned to the police station where petitioner gave an oral statement to an FBI agent and signed a written statement given to Wlcek (App. 68, 698-700). After signing a waiver of rights form, petitioner also supplied the FBI agent with handwriting samples. Petitioner was not arrested and he left the police station at approximately 6:15 PM (App. 601-602). An FBI laboratory analysis of these and additional handwriting samples produced the opinion that the handwriting on the samples and the forged checks was by the same person (App. 1195-1200; 1229-1241).

Petitioner testified at the suppression hearing that at all times during his questioning by the police on September 16, 1968, he continuously wanted to leave the presence of the officers, but that he was told that he could not leave until he gave a statement and consented to the search of his home. He also stated that the papers he signed were all signed without being read and were signed involuntarily (App. 129-130, 133-139, 144-146). The district court in denying the motion to suppress noted that he found the testimony given by petitioner, then a twenty-eight year old law student with a masters degree, unworthy of belief (Pet. App. A).

1. Petitioner contends that oral statements he made to Sgt. Wlcek while at the bank were inadmissible since he had not been warned of his rights under *Miranda* v. *Arizona*, 384 U.S. 436. Sgt. Wlcek, however, testified at the hearing held on petitioner's motion to suppress that petitioner was advised of his rights before any questions

were asked (App. 63-64).[2] It should be noted that no statements made by petitioner while at the bank were offered into evidence and that those subsequent statements that were offered into evidence were found to have been voluntarily given after petitioner had been undeniably warned of his rights (App. 521-524, 646). Accordingly, even assuming arguendo that the earlier statement would have been inadmissible, the subsequent statements that were actually introduced had an independent source, coming as they did after *Miranda* warnings. Cf. *United States* v. *Shea*, 436 F. 2d 740, 742 (C.A. 9).

2. Petitioner also claims that the bankbooks were improperly admitted since it was not shown that they were voluntarily surrendered. Relying on *Bumper* v. *North Carolina*, 391 U.S. 543, petitioner contends that since the police were "searching" the car when he turned the bankbooks over to the police, his submission to official authority already being asserted did not amount to consent. This contention is not supported by the record. Sgt. Wlcek testified that when he and petitioner walked out to the car, two other officers were "checking" petitioner's car, but at no time during direct or cross-examination did he state that the officers were searching petitioner's car. As the evidence shows, petitioner voluntarily consented to the subsequent search of the car.[3]

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[2] On direct-examination Wlcek stated that petitioner had been advised of his rights several times at the bank, before and after petitioner produced the bank books from his car, although he was not sure of the exact sequence in relation to the receipt of the oral statement (App. 193-194).

[3] Prior to the time petitioner turned the bank books over to the police he had been warned of his *Miranda* rights, but had not been advised that he could refuse consent to the search. The issue of the warning—if any—necessary to support a consenual search is before the Court in *Bustamonte* v. *Schneckloth*, 448 F. 2d 699 (C.A. 9), certiorari granted, 405 U.S. 953. The Court may wish to defer disposition here pending its ruling in *Bustamonte*.

3. Petitioner also contends that the admission of the forged checks which bore markings of the federal reserve bank in New York was improper since there was no showing by the records of the New York bank that the marks had been made in the ordinary course of business and there was, therefore, no proof of interstate transportation. This contention is without merit.

The government qualified four witnesses as experts in banking procedures and practices. These witnesses were the keepers of the bank business records in the various banks where the forged checks had been deposited. As part of their testimony, the witnesses identified the checks and rendered expert opinion as to the significance of markings on the checks, including the New York federal reserve and drawee bank stamps which appeared on the check. The checks were admitted as business records kept by the banks (App. 1402-1404). The admission of the checks alone was sufficient real evidence to prove the interstate movement of the checks. *United States* v. *Mustin,* 369 F. 2d 626 (C.A. 7). In addition, the testimony of the record keepers that the checks had been sent to the Federal Reserve Bank in New York for collection and the fact that the checks were drawn on out-of-state banks also evidenced the interstate transportation of the checks (App. 788, 825, 924). See *United States* v. *Sheridan,* 329 U.S. 379, 391.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1973.